**Working Group Workpackage VII**

Quasi-constitutional nature of the Lisbon Treaty (Lucia S. Rossi)

# Agenda

Thursday 6 June 2013
16.00 – 17.30 h
Fondation Universitaire, Rue d'Egmont 11
Salle D

## "Towards a multi-level Constitution in the European Union"

**Outline:**

The Third Working Group session will try to ascertain, the relation between the EU constitutional order and the international system, on the one side, and the domestic constitutional systems of the Member States. To that effect the conflicts, but also the progressive convergence between the national, supranational and international levels must be taken into consideration with a view to understand the suitability of a multi-level constitution, especially as far as the protection of fundamental rights by and within the EU is concerned. During the event, which is intended to draw the conclusions from the research conducted over the first three years of the projects, the follow-up of the 2012 Bologna Workshop will be discussed.

**Introductory Statements:**

*Lucia S. Rossi*, University of Bologna
*Federico Casolari*, University of Bologna
*Paul Luif*, Austrian Institute of International Affairs (Vienna)

**General Discussion**

# Report

## Introductory statements

*Lucia S. Rossi* (University of Bologna) introduced the delicate nuances between the national, European and international systems of law. She indicated that for instance in Italy there was a hierarchy of laws from national, through international, to European law, while in the UK there was no constitution and the international system was based above the European one. The interfering between the different levels produced what was called the 'multi-level system', of which one of the fundamental principles was that the EU law must respect the national identity of each EU Member State. Nonetheless, the question was what belonged to the national identity: fundamental values and rights might be differently understood and defined by a state. Lucia Rossi continued by outlining that the primacy of the EU law had been enacted since the 1964 decision Costa v ENEL of the European Court of Justice. It was confined in the (non-binding) Declaration attached to the Treaty of Lisbon. Recently, due to the implementation of the Stability Mechanism, several national constitutional courts (Portugese, German) presented their reservations towards the legislation, thus placing themselves close to being against the primacy of the EU law and the ECJ.

*Federico Casolari* (University of Bologna) underlined the constant interplay between the international law and EU legal order. Art. 21 TEU states that the EU must respect the international law and the UN Charter. Art. 216 TFEU reminds that the international agreements are binding upon the Member States and EU institutions. Art. 351 TFEU recalls the interplay between the treaties concluded by the Member States and the EU law (To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established). Federico Casolari argued that, as the recent case of the Kadi II (so called "Kadi saga") showed, there was a question if there exists a possibility to limit EU constitutional law and to ensure instead effective execution of the UN/international law. The argumentation from the EU Advocate General is that both the EU and the UN are two organisations with their respective legal systems, sharing common values, priorities and responsibilities, so they shall act in mutual confidence. The case represented the typical conflict of supreme values, which albeit did not count for more than 1% of all the issues, raises a question on what should prevail.

*Jean-Paul Jacqué* (Secretary General, TEPSA) was convinced that if the EU treaties were a constitution, then they would prevail over national law. But the reality was the multi-level constitution. According to his view, the EU's system was complementary to the international one, there was not any pyramid of a hierarchy. Instead, it was a system of interactions, which was the crux of the matter: Jean-Paul Jacqué underlined that there was no regulatory body between the different levels. As shown by recent examples of Czech, German, Portugal and Italian constitutional courts, there was a potential of conflict. That was the very reason why the political cooperation was so relevant. Another issue was the situation in Hungary – each Member State is supposed to respect the fundamental values, rights and obligations. Nevertheless, the Charter of Fundamental Rights of the EU, where these values are stated,

applied only when the EU law applies, and not the national law. In the latter case it cannot be executed, and that was why it is so hard to take a decision against the country.

*Paul Luif* (Austrian Institute of International Affairs, Vienna) compared the discussion on the multi-level constitutional system to an American debate on a division between the federal and the state law, called a dual or cooperative federalism. He focused on the area of shared competences, in the EU defined by the Art. 2. para. 2. TFEU: The Member States shall exercise their competence to the extent that the Union has not exercised its competence, in the US called a 'pre-emption'. The pre-emption mechanism clarifies that if the state law impedes the federal one, the former one must be annulled.

## 2. Discussion

*Gianni Bonvicini* (IAI Rome) inquired, firstly, what changes the Treaty of Lisbon had brought into the multi-level constitutional system, and secondly, with regard to peacekeeping operations, if it would be possible for the EU to act as an autonomous actor without waiting for a mandate from the UN Security Council? *Marikki M. S. Stocchetti* (FIIA) and *Judith Hoevenaars* (Clingendael) discussed the question whether firstly the centralisation of the system would result in avoiding the current problems and secondly what the impact of the crisis on it was.

Federico Casolari commented that the Treaty of Lisbon did not bring much change to the multi-level system. When it came to the peacekeeping possibility, he stated that there had been such theoretical a possibility, but it was a political choice of Treaty makers to link the EU action to international law and specifically the UN Charter, and rule such a voluntarism out.

*Paul Luif* answered that the centralisation was not possible, as the EU was a federation of states, and the Member States remained sovereign. Jean-Paul Jacqué added that the fundamental difference between the EU and the US was that the latter had been designed as a federation from the outset. The EU Member States would never accept the community method in the field discussed.

*Anita Sęk* (TEPSA Trans European Policy Studies Association)